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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 35

ALLEN FRANK DAVIS, *Petitioner*

v.

STATE OF ARKANSAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS AND APPENDICES

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IN THE

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OCTOBER TERM, 1968

No. .....

ALLEN FRANK DAVIS ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The petitioner, Allen Frank Davis, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas, affirming his convicition of the crime of murder in tbe first degree and his sentence to die by electrocution in the Arkansas State Penitentiary.

CITATION TO THE OPINION BELOW

The opinion of the Arkansas Supreme Court has been reproduced at Appendix A, infra, p. 11, and is reported in No. 14 of the Arkansas Supreme Court Advance Reports as 246 Ark. 827. The dissenting opinion of the Chief Justice appears in the same publication and is reported as 246 Ark. 836. The dissenting opinion has been copied at Appendix B, *infra*, p. 19.

JURISDICTION

Both the majority and dissenting opinions of the Arkansas Supreme Court were delivered on May 5, 1969. A Petition for Rehearing was timely filed, but that application was denied on June 2, 1969 by a per curiam order.[1] A Motion for Stay of Mandate was submitted pending the disposition of this Petition for Writ of Certiorari. That Motion was granted.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Was the petitioner deprived of due process of law where, during the course of the trial, he was excluded from, and was not present at, several important stages of the proceeding?

2. Where the petitioner's counsel objected to the introduction of certain photographs of a second gunshot victim, blood, bullet holes and police officers, did the trial court err by permitting the photographs to be admitted into evidence?

3. Did the manner in which the voir dire examination of prospective jurors was conducted and the trial judge's rulings as to their qualifications concerning bias, knowledge and the death penalty deprive the petitioner of a fair and impartial jury?

4. Is the Arkansas procedure for, and the petitioner's sentence of, the death penalty unconstitutional under the Eighth and Fourteenth Amendments?

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[1] Reference to the order is found on an unnumbered page of No. 18 Arkansas Supreme Court Advance Reports.

CONSTITUTIONAL PROVISIONS INVOLVED

The petition presents issues involving the Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

The petitioner, Allen Frank Davis, is an adult Caucasian male. He was charged by felony information in the Garland Circuit Court with the first degree murder of his estranged wife, Sharon Davis.

Upon a plea of insanity, the trial court committed the petitioner to the Arkansas State Hospital for observation pursuant to applicable statutes[2]. Approximately a month later, the Psychiatric Staff certified that the petitioner was then insane and probably mentally ill to the degree of legal irresponsibility at the time of the alleged crime. The trial court denied the State Hospital's request for a Writ of Commitment and proceeded to schedule the petitioner's trial. An effort was made to stay the proceedings, but the Arkansas Supreme Court denied the writ of prohibition.[3]

Later, after a hearing, the trial judge determined that the petitioner was in need of psychiatric treatment and ordered that the petitioner be delivered to the State Hospital until such time that the petitioner became mentally able to assist his attorneys in the preparation of his defense.

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[2] Ark. Stat. Ann. § 43-1301 et seq.

[3] Davis v. Britt, Judge, 243 Ark. 556, 420 S.W. 2d 863 (1967).

On April 8, 1968, almost a year and three months after the shooting and death of his wife, the petitioner was returned to Garland County to stand trial.

All jurors with religious convictions, scruples or objections to the death sentence were excused for cause by the trial judge.

The fact that the petitioner did shoot and kill his wife was not disputed. However, strenuous objections were raised to the offer of evidence and photographs disclosing that the petitioner had also wounded his mother-in-law.

The defense consisted of thirteen lay witnesses and two psychiatrists who testified regarding the petitioner's conduct and insanity. The prosecution produced two psychiatrists on rebuttal, one of whom voiced an opinion as to the petitioner's sanity at the time of the shooting.

The jury found the petitioner guilty and made no recommendation for leniency. The death penalty was, therefore, mandatory. The Arkansas Supreme Court affirmed with one dissenting vote and one judge not participating.

REASONS FOR GRANTING THE WRIT

1. The Fact that Petitioner Was Not Present During Certain Important Stages of the Proceeding Deprived Him of Due Process and Requires that Certiorari be Granted.

It seems fundamental that if due process of law demands a fair and impartial trial, it likewise includes the requirement that the accused be present and attending every aspect of that trial. Until the decision below, the Arkansas Supreme Court had jealously guarded this right "to secure to the accused full facilities for the defense." *Bearden* v. *State*, 44 Ark. 331

There were at least four instances where the petitioner was not present while important matters were determined in chambers. See: R. 347-357; 375-380; 676-686; 696-701.

The court below answered this argument with the finding that the petitioner and his trial counsel waived the right to have the petitioner present. Apparently aware that the record furnished no support for this conclusion, it was hastily added that the same matters conducted in chambers were repeated again in open court. 246 Ark. at 834 and 835.

The reasoning of the court is almost ludicrous. A casual reading of the record fails to reveal waiver by either the petitioner or his attorneys. Further, a comparison between the proceedings in chambers and those before the petitioner and the jury discloses little similarity.

The fact to keep foremost is that petitioner had only returned from the State Hospital a few weeks prior where he had undergone treatment for over a year. At least several persons were of the opinion that the petitioner had been and was still insane.

In addition, the decisions of this Court have taught that a waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464. In *Fay* v. *Noia*, 372 U.S. 391, it was declared that "the doctrine of fictitious waiver is unacceptable." In *Whitus* v. *Balkcom*, 333 F. 2d 496 (5 Cir. 1964), cert. denied, 379 U.S. 93, this comment seems particularly applicable: "... the important fact ... was that the attorney ... did not consult his client with regard to his decision ..."

2. The Introduction of Certain Testimony and Nine Photographs Were So Prejudicial as to Deprive Petitioner of Due Process of Law.

During the prosecution's case in chief, the witnesses disclosed that the petitioner saw his wife at a public laundromat, had a brief conversation with her as she sat in her automobile, and fired one shot from a rifle at close range. The victim's mother ran into the laundromat and the petitioner fired another shot wounding her. The prosecution sought to introduce eleven photographs into evidence (R.375). Specific objections were made to the nine photographs that have been reproduced at Appendix D. One photograph was withdrawn but the others were admitted into evidence (R.381). Exhibits 7 and 8 show Mrs. Knight laying on the laundromat floor. Exhibits 9 shows a bullet hole in the glass door and a large pool of blood. Exhibit 10 is a closer photograph of the pool of blood.

As the dissenting opinion emphasizes, these four photographs contributed nothing to the prosecution's case. They proved no element of the crime charged. The protographs were introduced and given to the jury for the exclusive purpose of inflaming the passion of the jury against the petitioner. It is well established that state trials must be conducted in such a manner as to be fundamentally fair to satisfy the constitutional safeguards. *Giles* v. *Maryland,* 386 U.S. 66 (1967).

In view of the dissent of Chief Justice Harris set out in full at Appendix B, there is little need to dwell further on this point.

3. The Manner in Which the Trial Jury Was Selected Prevented Petitioner From Having a Fair and Impartial Jury.

Certiorari should be granted to review the voir dire examination of prospective jurors. It is submitted that the trial judge ruled in such manner so as to cause the construction of a "tribunal organized to return a verdict of death." *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968).

The petitioner was charged with murder in the first degree. The punishment for this crime in Arkansas is death or life imprisonment. Ark. Stat. Ann. §§ 41-2227, 43-2153 Appendix D; *Walton* v. *State,* 232 Ark. 86, 334 S.W. 2d 657.

While the trial court was aware of the pronouncements of *Witherspoon,* nothing more than mere lip service was given to enforce its spirit. One prospective juror, Estelle Truby, was excused for cause for a "just don't know" response (R.103). Another member of the venire, James B. Moore, was dismissed because he "just couldn't" adjudge the death penalty even though he answered "I don't know" when asked if his feelings would cause him to refuse to consider the imposition of the death penalty (R.89-91). Others were improperly dismissed when challenged for cause although their answers to the examination of the judge fell far short of the criteria of *Witherspoon,* Eg. Betty Ott (R.67-72), Manuel Brandley (R.74-77), Laura L. Bourgeouis (R.94-101), V. E. Sammons (R.111-115), Ruey S. Ault (R.173-177), R. L. Coon (R.218-227), Homer Hutzel (R.228-236), and Ernest Wright (R.258-265).

It should be fair to state that all of the prospective jurors who professed a bias against capital punishment were excused by the trial court leaving petitioner with all pre-emptory challenges exhausted (R.270-271) to be tried by a death oriented jury. This brazen method of excluding certain persons from jury duty strikes at the very roots of our American concept of an impartial jury drawn from

members of the community. *Crawford* v. *Bounds*, 395 F. 2d 297 (4 Cir. 1968).

4. Certiorari Should Be Granted to Consider the Contention That the Method Used to Secure the Sentence and the Sentence Itself Are Unconstitutional.

This proposition is presented as a reason for granting certiorari with the knowledge that it has previously been rejected by other courts and that the same question is awaiting decision by this Court in yet another case which coincidently also originated in Garland County, Arkansas. *Maxwell* v. *Bishop*, No. 622, October Term 1968.

When considering the question, the one thing on which the lower courts have agreed is that the ultimate decision must be made by this court. *Ralph* v. *Pepersack*, 335 F. 2d 141 (4 Cir. 1964): *Maxwell* v. *Stephens*, 348 F. 2d 325 (8 Cir. 1965).

As the issue of penalty was submitted to the jury in their unlimited discretion under Arkansas procedure, their attention was directed to none of the purposes of criminal punishment, nor to any aspect or aspects of the petitioner's conduct. They were not invited to consider the petitioner's susceptibility or lack of susceptibility to reformation, the extent of the deterrent effect of killing the defendent *"pour decourager les autres."* Cf. *Packer, Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964). They were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all: at a whim, or a vague caprice. In making the determination to impose the death sentence, they acted wilfully and unreviewably, without standards and without direction. Nothing assured that there would be the slightest thread of connection between the sentence they

exacted and any reasonable justification for exacting it. Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). A judgment so unconfined, so essentially erratic, is per se cruel and unusual because it is purposeless. There is no relationship by which its fitness to the offense, or to the offender or to any legitimate social purpose may be tested. It is cruel not only because it is extreme but because it is wanton. It is unusual not only because it is rare, but because the decision to remove the defendant from the ordinary penological regime is arbitrary. To concede the complexity and interrelation of sentencing goals, is no reason to sustain a statute which ignores them all. It is futile to put forward justifications for a death so inflicted. There is no assurance that the sentence responds to the justification or will conform to it in operation. Inevitably under such a sentencing regime, capital punishment in those few, arbitrarily selected cases where it is applied both is " 'disproportioned to the offenses charged' " and constitutes " 'unnecessary cruelty.' " *Rudolph* v. *Alabama*, 375 U.S. at 891 (1963).

CONCLUSION

It is urged that petitioner has revealed several instances in the record of his trial and in the decision of the Arkansas Supreme Court that are contrary to the decisions of this Court and the concepts of justice. Certiorari should be granted in order that the errors committed in the court below may be fully developed and the petitioner's conviction reversed.

Respectfully submitted,

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AUGUST, 1969

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 5378

Allen Frank Davis
Appellant
v.
State of Arkansas
Appellee

Opinion Delivered May 5, 1969.
Appeal from Garland Circuit Court, Hon. Henry M. Britt, Judge; affirmed.

CONLEY BYRD, Associate Justice. On January 19, 1967, appellant Allen Frank Davis shot and killed his estranged wife Sharon Davis with a 30-30 caliber rifle. The jury found him guilty of murder in the first degree without recommendation and he stands before this court sentenced to death by electrocution. His defense was not guilty by reason of insanity.

The record shows that appellant and his wife Sharon separated in August of 1966. Following the separation, appellant lived with his mother. On the date involved, appellant had caused his wife to be kept under surveillance by a friend. About quitting time appellant joined his friend across the street from where his wife worked. When he joined his friend he had with him a denim jacket described by his friend as being stiff enough to stand in the corner alone. While they were watching, his mother-in-law drove by with his children to pick up his wife. Appellant told his friend that he hated his mother-in-law but liked her cooking and, in parting, told him he was going to do something that he should have done a long time ago. His mother-in-law and Sharon proceeded to the Red Bird Laundromat and Service Station on Central Avenue. Ap-

pellant followed. At the laundromat he exchanged some words with his wife before he shot her. He also shot his mother-in-law when she ran into the laundromat for help. Witnesses testified that as he drove away he brandished his shooting iron and shouted, "Sharon, how do you like that." Appellant was arrested at his mother's home a few minutes later where he was sprawled out on a bed in a stupor after taking some pills. The 30-30 rifle was found wrapped in his denim jacket in a dog pen.

POINT 1. Appellant, in arguing that he was deprived of his rights under the fifth amendment of the United States Constitution by virtue of the fact that he was tried and convicted upon an information, readily recognized that we have rejected this argument many times. Prosecution by information is authorized by Amendment 21, of our constitution. As we have pointed out many times the Federal Courts have not held that prosecution by information is prohibited by the United States Constitution. For this reason we hold appellant's first point to be without merit.

POINT 2. Appellant contends here that the trial court erred, under the holding in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), in excluding jurors who had conscientious scruples against capital punishment. A subsidiary argument is that the trial court insured the prosecution's request for a conviction and death sentence by excluding all prospective jurors who said they opposed the death sentence or had religious or conscientious scruples against the death penalty. We do not believe that the record sustains appellant's argument.

As we read the record, the trial court followed the *Witherspoon* case, excluding Justice Douglas's concurrence, and our own case of *Adkins* v. *State*, 16 Ark. 568 (1855). In the latter case we pointed out:

> "Whatever may be a man's view of capital punishment as a question of policy, the jury box is not a proper place for him to consider such policy. There he is obliged, by his oath, to try the guilt or innocence of the accused, according to law and evidence, and not to set up his own private opinion against the policy of the law, which he is bound, as a good citizen, to abide by and administer, so long as it is force, and until it is repealed by the constituted authority. See the authorities collected on this subject in *Wharton's Crim. Law* 857, 858."

To follow appellant's argument to its logical conclusion would create a kind of anarchy in our system of government whereby the minority will always hold a veto over any established public policy. For instance, since the holding in *Bloom* v. *Illinois,* 391 U.S. 194 (1968), it would be almost impossible to enforce some provisions of the 1964 Civil Rights Act, if a court were forced to accept jurors whose private opinions are contrary to the policy of the law. For these reasons we find this point without merit.

POINT 3. We find no merit in appellant's argument that the trial court abused its discretion in admitting in evidence pictures taken by William Ralph Dever, Jr. The record shows that Mr. Dever is a commercial photographer and a mail man. He has a police radio receiver in his car. When he heard the call concerning the shooting he immediately went to the scene and took the pictures of which appellant complains. In permitting the pictures to be introduced, the trial court pointed out that they were taken within a reasonable time after the incident involved and that they helped explain the testimony as to what actually occurred, nothing more, nothing less.

In *Stewart* v. *State,* 233 Ark. 458, 345 S.W. 2d 472 (1961), we pointed out that it is within the sound discre-

tion of the trial judge to permit the introduction of photographs to describe and to identify the premises which were the scene of the crime, to establish the corpus delicti of the crime charged, to disclose the environment of the crime at the time it was committed and to corroborate testimony. See also, *Reed* v. *McGibboney*, 243 Ark. 789, 422 S.W. 2d 115 (1967).

Under this point appellant also argues that the pictures introduced into evidence concerning Mrs. Knight's shooting and the bloodstained floor from which she was removed are not relevant, material or competent. Here, too, we find this was a matter within the discretion of the trial court. The record shows that at the time Mrs. Knight picked up appellant's estranged wife, appellant expressed hatred for Mrs. Knight, his mother-in-law. Since the shootings were all one occurrence we are unwilling to say that the photographs could not be introduced for the purpose of showing malice.

POINT 4. On the issue of insanity, appellant used two expert witnesses, Dr. Shelton Fowler, a psychiatrist on the Arkansas State Hospital staff, and Dr. Robert F. Shannon, a private psychiatrist. Dr. Fowler's treatment was limited to his duties as an employee of the state hospital. Dr. Shannon was employed by appellant's mother for purposes of testifying at the trial.

To rebut appellant's expert testimony, the state called Dr. Yohe, a psychiatrist hired by Garland County to examine appellant for purposes of determining his sanity, and Dr. Robert Lewis, a psychiatrist originally employed by appellant's mother for medical treatment and psychiatric evaluation immediately following appellant's arrest. Appellant argues that the testimony of the latter two doctors

is privileged within the meaning of Ark. Stat. Ann. § 28-607 (Repl. 1962). That statute provides:

> "Hereafter no person authorized to practice physic or surgery and no trained nurses shall be compelled to disclose any information which he may have acquired from his patient while attending in a professional character and which information was necessary to enable him to prescribe as a physician or do any act for him as a surgeon or trained nurse. Provided, if two [2] or more physicians or nurses are, or have been in attendance on the patient for the same ailment, the patient by waiving the privilege attaching to any of said physicians or nurses, by calling said physician or nurse to testify concerning said ailment, shall be deemed to have waived the privilege attaching to the other physicians or nurses."

We find that when appellant called Dr. Shannon, as distinguished from Dr. Fowler, who may have served in a different capacity, he waived any privilege which he may have had a right to claim under the statute.

POINT 5. Appellant here argues that the verdict of the jury ignores the overwhelming evidence of insanity and that their verdict is contrary to the evidence and to the law concerning insanity. Our cases, without exception, hold that when there is conflicting evidence upon an issue the matter should be presented to the jury. In this instance there was testimony from which the jury could have found either way. In addition to the lay testimony, two doctors testified that appellant was insane and two doctors for the state testified that appellant was mentally competent. Therefore we find this contention without merit.

POINT 6. In his argument on instructions, appellant admits that the insanity instruction given by the trial

court is in accordance with *Bell* v. *State*, 120 Ark. 530, 180 S.W. 186 (1915), but puts forth the argument adopted by the author in 20 Ark. Law Review 123 that the rule in *Bell* v. *State* represents "the hardened attitude". Appellant's description of the insanity rule laid down in *Bell* v. *State* is that of the author of the law review article referred to above. We do not necessarily accept as accurate appellant's description of the rule there laid down. However, we do acknowledge that the rule of who has the burden of proof on the issue of insanity is not uniform in the many jurisdictions in this nation. The rule in *Bell* v. *State* has been applied many times by this court and in a number of cases in which other rules have been rejected. See *Stewart* v. *State*, 233 Ark. 458, 345 S.W. 2d 472 (1961). We again reaffirm *Bell* v. *State* in holding appellant's objections to the trial court's instruction no. 5 to be without merit.

Appellant also complains of error in the trial court's refusal to give his instructions numbers 1 and 3. His instruction no. 1 had to do with the burden of proof in the whole case and was covered by other instructions given by the court. Appellant's instruction no. 3 merely gave a definition of preponderance of the evidence, and this too we find was covered by the court's instructions number 5 and 6.

Appellant's requested instruction no. 9 provides: "You are hereby instructed that if you should find that the defendant, Frank Davis, was in fact under the influence of alcohol and/or drugs to the extent that he would be incapable of forming an intent, then you must find the defendant not guilty of the charge of murder in the first degree." We find no evidence in the record to warrant the submission of instruction no. 9 with reference to intent. The uncontradicted testimony in the record shows that he was driving

his automobile at the time and that after the shooting he entered his mother's home and told her that he wanted a conference with her. It is true that he was found by the officers on the bed in a blacked-out condition, but here again the testimony shows that it was a result of some pills taken subsequent to the shooting.

POINT 7. In arguing that the trial court erred in excluding the appellant and/or permitting his absence during trial, appellant refers to conferences in chambers between the court and counsel. The first such conference was conducted on the admissibility of certain evidence from officer Seal. This conference was requested by the court and before any proceedings were had, the deputy prosecuting attorney, Mr. Harrison, asked appellant's counsel if he wanted appellant present. Appellant's counsel replied, "We don't know, we don't know what is going to happen." All other such conferences between court and counsel were had at the request of appellant's counsel.

Therefore, as we read the record there was no exclusion of appellant from the in-chamber hearings. Furthermore the record shows that all rulings made as result of the in-chamber hearings were again made in open court before the jury, except in those instances when counsel for appellant specifically requested such rulings be made in chambers and not before the jury. Under these circumstances we find that if any error was committed, it was waived by appellant and his counsel. See *Davidson* v. *State*, 108 Ark. 191, 58 S.W. 1103 (1913), and *Nelson* v. *State*, 190 Ark. 1027, 82 S.W. 2d 519 (1935). In holding that there was a waiver, we specifically point out that appellant was not excluded from such hearings and that the conduct complained of involved matters ordinarily conducted by attorneys upon objections made in open court prior to the entry in chambers.

POINT 8. Appellant's last argument is that the imposition of the death sentence constitutes cruel and unusual punishment. In making this argument, appellant acknowledges that this court has held that punishment authorized by statute is not cruel and unusual unless it is barbarous or unknown to the law, or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. In making this statement, however, appellant poses this question, "Does the moral sense of this community, taking a cross-section of its people, adhere to and approve the taking of human life as fit punishment?" Our answer to appellant's question is that it should be addressed to the legislature instead of the courts, except in those instances wherein the court may exercise its discretion under Ark. Stat. Ann. § 43-2310 (Repl. 1964). From our reading of the record we are not in a position to say that the punishment assessed is greater than ought to be inflicted under the circumstances here shown. We make this observation without determining whether the statute vests the discretion in the trial court or in this court or both.

In his motion for new trial appellant raised other issues. We find all such issues to be without merit.

Affirmed.

HOLT, J., not participating.

HARRIS, C.J., dissents.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 5378

Allen Frank Davis	Opinion Delivered May 5, 1969.
Appellant	Appeal from the Circuit Court
v.	of Garland County; Honorable
State of Arkansas	Henry M. Britt, Judge; dis-
Appellee	senting opinion.

CARLETON HARRIS, Chief Justice. I think the trial court committed error by allowing state exhibits No. 7, 8, 9 and 10 to be introduced into evidence. These exhibits all relate to the shooting of Mrs. Pauline Knight, mother of the deceased, Sharon Davis. Mrs. Davis was shot while sitting in her automobile, and Mrs. Knight was shot just outside the Laundromat. Exhibit 7 shows Mrs. Knight lying in front of the Laundromat door; exhibit No. 8 depicts the same scene from a different angle; both No. 9 and No. 10 show a large pool of blood left in the doorway after Mrs. Knight had been removed.

I do not consider this evidence to be relevant, nor proper, to the crime with which Davis was charged (the murder of his wife). The shooting of Mrs. Knight was an entirely separate offense, for which he could also have been tried, and this evidence had nothing to do with appellant's motive in killing Mrs. Davis. The majority say:

> "Under this point appellant also argues that the pictures introduced into evidence concerning Mrs. Knight's shooting and the bloodstained floor from which she was removed are not relevant, material or competent. Here, too, we find this was a matter within the discretion of the trial court. The

> record shows that the time Mrs. Knight picked up appellant's estranged wife, appellant expressed hatred for Mrs. Knight, his mother-in-law. Since the shootings were all one occurrence we are unwilling to say that the photographs could not be introduced for the purpose of showing malice."

Malice for whom? The majority answer that question by saying that Davis had expressed hatred for his mother-in-law. Since hatred for his mother-in-law was not the reason for his shooting his wife, I can see no reason for the court to have permitted the introduction of these photographs. In *State* v. *Palmer* (La.), 80 So. 2d 374, the Louisiana Supreme Court said:

> "In determining their admissibility, proper inquiry should be made to ascertain whether such evidence would clarify some material issue and would afford the court and the jury a clearer comprehension of existing physical facts and throw greater light and more accurate appreciation of the weight, if any, to be given the oral testimony. Manifestly, where photographs are irrelevant or immaterial, would confuse, or mislead, rather than be helpful, distract the tribunal's attention to other than main issues, or where the natural effect of their introduction in evidence would arouse the sympathies or prejudices, rather than throw helpful light, such evidence should be promptly excluded."

In Volume 1, Wharton's Criminal Evidence (12th Edition), § 154, Page 299, we find:

> "The requirement that evidence be relevant applies to documents and photographs with the same force and effect as to other forms of evidence. They must be relevant to establish or disprove *the fact concerning which they are offered.*"[1]

---

[1] My emphasis.

In Volume 2 of the same edition, Section one, Page 652, it is said:

> "As in the case of all evidence, photographs must be relevant, and are inadmissible if they introduce a substantial irrelevant element. Thus a photograph of the victim of the crime and of a weapon is inadmissible when the weapon is not related to the crime."

In line with these authorities, I maintain that the photographs of the shooting of Mrs. Knight were not relevant to establish the fact sought to be proved, *i.e.*, the murder of Mrs. Davis. Mrs. Davis had already been mortally wounded before Mrs. Knight was shot, and the photographs therefore were not related to the crime with which Davis was charged and convicted. It is my view that this evidence could only distract the jury's attention from the main issue, and could only tend to arouse prejudice against appellant.

Because, in my opinion, the court erred in allowing the photographs relating to Mrs. Knight to be introduced, I would reverse the judgment.

APPENDIX C

ARKANSAS STATUTES CITED

Section 41-2227

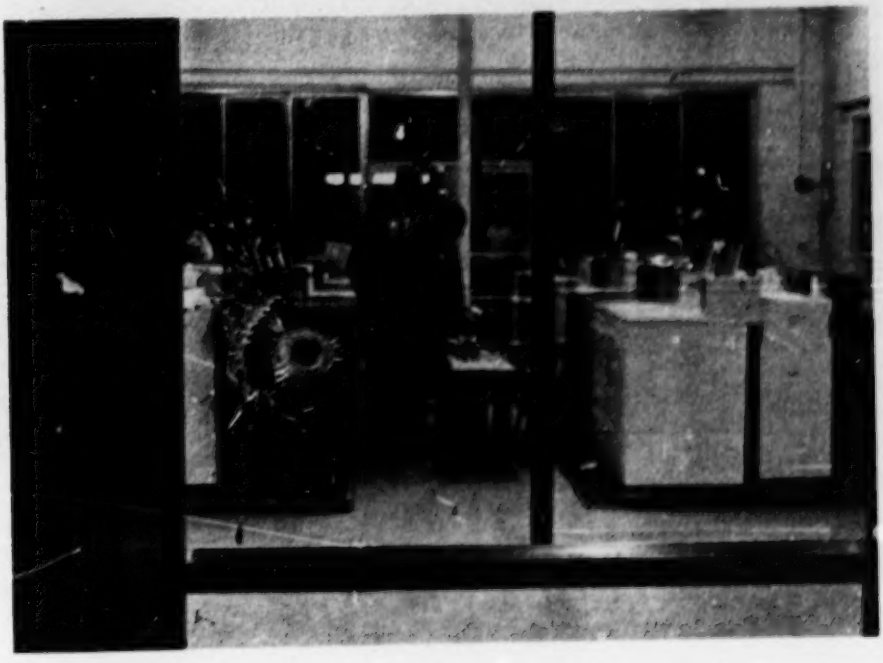
> "Every person convicted of murder in the first degree, or as accessory before the fact to such murder, shall suffer death (by hanging by the neck) [or life imprisonment]."

Section 43-2153

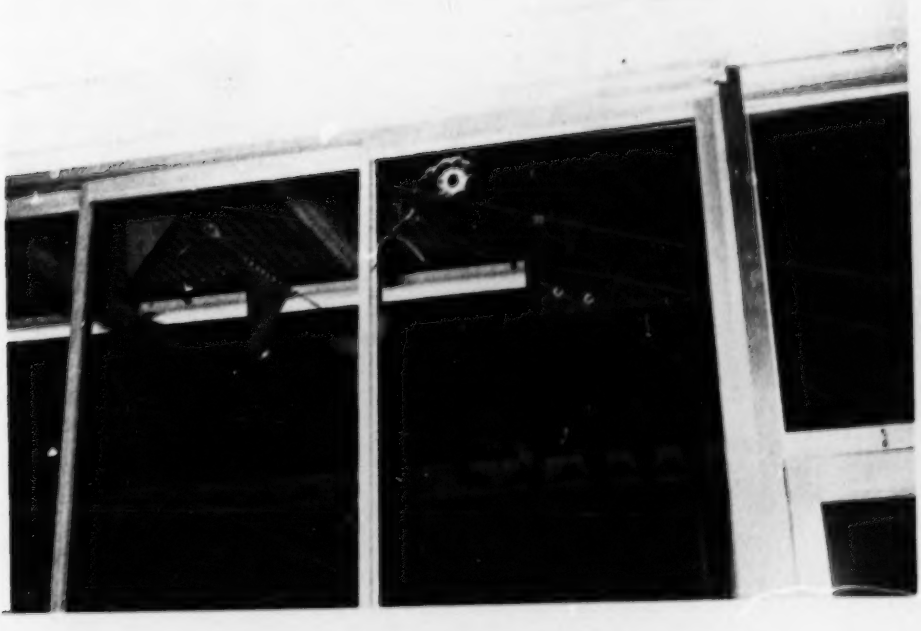
> "The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor."

APPENDIX D

STATE EXHIBIT 4



STATE EXHIBIT 5



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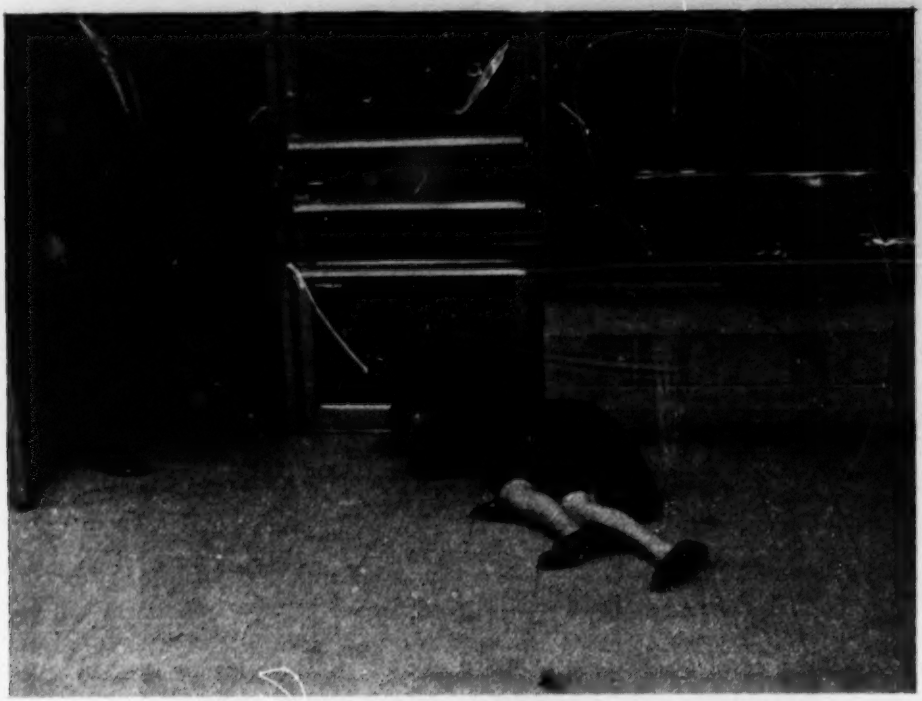

STATE EXHIBIT 7

STATE EXHIBIT 8

STATE EXHIBIT 9

STATE EXHIBIT 10

STATE EXHIBIT 11

STATE EXHIBIT 12

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970
No. [redacted] 35

ALLEN FRANK DAVIS
PETITIONER,
vs.
STATE OF ARKANSAS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969
No. 527

ALLEN FRANK DAVIS
PETITIONER,
VS.
STATE OF ARKANSAS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

Both the majority and dissenting opinion of the Supreme Court of Arkansas have been properly noted in the Petition for Writ of Certiorari and have been set forth verbatim in the appendix which accompanies the petition.

JURISDICTION

The authority on which petitioner relies to invoke the jurisdiction of this Court is also contained in the petition.

STATEMENT

The petitioner, Allen Frank Davis, is presently an inmate in the Arkansas Department of Corrections. He was charged by felony information with the crime of first degree murder of his wife, Sharon Davis, in Garland County Circuit Court, Hot Springs, Arkansas. The killing occurred on January 19, 1967, and after a mental examination at the Arkansas State Hospital, petitioner was tried before a jury on June 11, 1968 and found guilty of first degree murder as charged.

On appeal to the Supreme Court of Arkansas, petitioner raised the same issues before this Court, his assignments of error were found to be without merit, and the case was affirmed, one judge dissenting. Since the jury made no recommendation for leniency, the death penalty was therefore mandatory.

ARGUMENT

It is submitted that the Petition for Writ of Certiorari does not disclose any substantial issue of law which warwants review by this Court. The record in this case fails to support the conclusion that petitioner was deprived of any right under the Constitution of the United States. Respondent is benefited by the studied and lengthy opinion of the Supreme Court of Arkansas affirming petitioner's conviction. This decision is correct and in accordance with the several pronouncements of this Court.

1.

Petitioner's absence during certain stages of the trial.

Petitioner contends that certiorari should be granted to determine whether he was denied due process by reason of not being present while certain matters were discussed in chambers with the trial judge. *Ark. Stat. Ann.* 43-2101 provides that a defendant must be present during his trial on a felony charge. However, his presence may be waived either by the defendant personally or by his counsel. *Nelson* v. *State,* 190 Ark. 1027, 82 S.W. 2d 519; *Walton* v. *State,* 233 Ark. 999, 350 S.W. 2d 302. The Arkansas Supreme Court noted in its opinion that the first conference in chambers was conducted by the Court before any proceedings were had. The Court also noted that all other such conferences were had at the request of the petitioner's counsel.

Upon a review of the record, the Arkansas Supreme Court concluded that there was no exclusion of petitioner from the conferences with the trial court in chambers. Respondent submits that the record supports the conclusion

of the Arkansas Supreme Court, and that this point is without merit. This point raises no substantial Federal question.

II.

The introduction of certain photographs.

Next, petitioner argues that certiorari should be granted to determine whether certain photographs of the scene of the crime should have been excluded. These photographs include pictures of the victim's mother, who was also shot and wounded in the perpetration of the murder of petitioner's wife.

Upon the introduction of pictures complained of, the Court instructed the jury that the pictures were to be considered only as descriptive of the testimony of the witnesses through whom they were introduced and not for any other purpose.

This cautionary instruction by the trial court was proper, and this position was upheld by the Supreme Court of Arkansas which stated that such photographs are admissible to describe and identify the premises and scene of the crime, to establish the corpus delicti, to disclose the environment of the crime at the time of commission, and to corroborate testimony. The introduction of the photographs, including the pictures of the victim's mother who was also wounded, are directly relevant to establish malice aforethought, deliberation, and premeditation, since it appears that the crime committed was contemplated by petitioner for some period of time. There is no error in this point. See also *Jones* v. *State*, 213 Ark. 863, 213 S.W. 2d 974, and *Stewart* v. *State*, 233 Ark. 458, 345 S.W. 2d 472. This point raises no substantial Federal question.

III.

The manner in which the trial jury was selected.

Petitioner argues that certiorari should be granted to review the voir dire examination of respective jurors, contending that the trial court erred in excusing certain jurors on the basis of *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968).

The *Witherspoon* decision was followed by *Williams* v. *Dutton,* 400 Fed. 2d 797 (1968) wherein the Court noted "... that *Witherspoon* concerns only the exclusion of persons who merely assert conscientous scruples against capital punishment. It does not prescribe the exclusion of venireman who states unequivocally that he would never impose the death penalty or that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt." A careful reading in this case will show that the trial court's exclusion of certain persons was on account of their inability to form an impartial judgment on the defendant's guilt by reason of their scruples against capital punishment. The jurors were extensively questioned by both the prosecution and the defense, and again by the trial court concerning these matters. The jurors excused for cause held to their position that they could not impose capital punishment in any event. The Supreme Court of Arkansas found this argument to be without merit, and respondent submits that this decision is correct. There is no substantial Federal question raised by this point.

IV.

The method to secure the death penalty and the death penalty itself are unconstitutional.

Petitioner contends that certiorari should be granted to consider whether the death penalty itself and the procedure by which it is inflicted are unconstitutional. This question was not presented to the Arkansas Supreme Court and for that reason should not be considered here. Further, the method and penalty are not unconstitutional, *Maxwell* v. *Bishop,* 398 F. 2d 138 (1968). See also *Bagley* v. *State,* 247 Ark. 113.

CONCLUSION

Petitioner's assignments of error and his arguments in favor of granting a Writ of Certiorari are entirely without merit. Certiorari should be denied.

Respectfully submitted,

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